Lafayette Steel Erectors, Inc. *and* **Joseph E. Spain** *and* **Harold P. Puderer.** Cases 15-CA-7822 and 15-CA-7835

March 26, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On November 10, 1981, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed a brief in response to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Lafayette Steel Erectors, Inc., Scott, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge our employees because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Joseph Spain immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges.

WE WILL make Joseph Spain whole for any loss of earnings he may have suffered as a result of our discrimination against him, with interest.

LAFAYETTE STEEL ERECTORS, INC.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard on August 25, 1981, in New Orleans, Louisiana. The charges were filed on August 18 and 27, 1980, respectively. The complaint, which issued on November 26, 1980, alleges that Respondent terminated employees Joseph Spain and Harold Puderer on June 1, 1980, in violation of Section 8(a)(1) of the Act.

Upon the entire record, my observation of the witnesses and after due consideration of briefs filed by the General Counsel and Respondent, I hereby make the following:

Findings[1]

The General Counsel argues that employees Spain and Puderer were terminated because they complained about unsafe conditions on Respondent's Gramercy, Louisiana, job on June 1, 1980.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In adopting the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) of the Act by discharging Joseph Spain, we rely on his conclusion that Respondent's motive for discharging Spain was Spain's protests over unsafe working conditions. We therefore find it unnecessary to pass on his interpretation of *Plastilite Corporation*, 153 NLRB 180 (1965), and *Tamara Foods, Inc.*, 258 NLRB 1307 (1981).

[1] Respondent admitted the commerce allegation in the complaint. On the basis of the allegations and admissions, I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

Employees Spain and Puderer were referred to Respondent's Gramercy job about mid-May 1980, by the Carpenter's Union, Local 1846. Harold Puderer testified that the job involved the construction of a coke bin out of wood. The bin was to be used for storing coke, which was to be used as fuel in heating aluminum. Spain described the bin as, "pyramid-shaped," 100 to 130 feet high.

Spain was originally employed as a foreman. However, a week to 10 days after reporting, Respondent changed his job from foreman to carpenter. Thereafter Spain worked as a carpenter. Puderer worked as a carpenter from his original referral in mid-May.

In late May, according to Puderer and Spain, they found some safety-related OSHA documents on the job. At Spain's suggestion those documents were distributed to other employees. Both Spain and Puderer passed out the documents. Spain also nailed an OSHA poster near the ladder that employees used in reaching the dome of the bin.

Shortly after the OSHA documents were distributed, a representative of Respondent, ultimately identified as David Puballs,[2] addressed the employees. According to Spain's unrebutted testimony, at the conclusion of the meeting Puballs asked Spain if he had anything to say. Spain told Puballs that the job was "All right with me as long as it was safe."[3]

On June 1, 1980, while working high on the dome of the bin, Spain noticed that some of the carpenters working alongside him did not have safety belts. Spain asked the men, "Where is your safety belts." Some of the men replied that they did not have safety belts and, "If they went down, they were fired." Spain asked the foreman, Kenneth Perkins, to get the union steward, James Story. Sometime after asking for the steward, Spain took off his shirt and asked the men around him including Harold Puderer and Clayton Whitfield, to take off their shirts. Spain testified that he took off his shirt in order to get a fast response. He said he was protesting for safety. Spain stated that a man without his shirt can be spotted from the ground more easily than someone without a safety belt.[4] Both Spain and Puderer testified that Whitfield took off his shirt. Spain recalled Puderer taking off his shirt. Puderer's recollections as to his actions in that regard appeared hazy. He testified, "I think I remember taking off my shirt sometime during the day, but I didn't want to get sunburned."

Spain testified that Foreman Perkins[5] and the steward came up and he and the others were told to put on their shirts or they would be fired. Spain said, "I will put my shirt back on as soon as you get safety belts for those guys on the job." The foreman agreed that he would get safety belts for the men. Spain stated that he then put his shirt on.

However, later that day Spain noticed "another man along side me holding on to the beam with no safety belt." At that point Spain again took off his shirt. Spain and Puderer testified that Puderer had cut his shirt up so that he was wearing only a part shirt. Clayton Whitfield took his shirt off. Shortly thereafter, Spain was discharged.[6] During that same day Puderer, along with some 12 carpenters, were laid off in a reduction in force.[7]

Findings of Fact

A. *Joseph Spain*

The record demonstrates conclusively that on June 1, 1980, Joseph Spain engaged in a protest over what he and at least two other employees perceived as unsafe working conditions. The evidence is not in dispute that Spain observed some employees working high up on the coke bin without safety belts.[8] Spain protested to supervision. Subsequently, Spain in further protest removed his shirt and asked two other employees to remove their shirts. Employees Puderer and Whitfield joined in the protest. Puderer either removed or cut up his shirt and Whitfield removed his shirt along with Spain on at least two occasions. Spain was subsequently discharged. His discharge followed direction from Foreman Perkins that he would be discharged unless he put on his shirt.[9] Spain's June 1 termination slip reflects that he was discharged for "insubordination."

B. *Harold Puderer*

The factual issues regarding Puderer present a more difficult problem. Puderer's testimony corroborates Spain's testimony reflecting that Spain initiated the June 1 protest and that Spain was the spokesman with Foreman Perkins. Although Puderer and other employees were laid off on June 1, Spain was the only employee that was discharged. Whereas Spain's termination slip reflects that he was terminated because of insubordination, Puderer's, like the slips of other laid-off employees

[2] Both Spain and Puderer originally identified the speaker as Mr. Delahoussaye. However, both ultimately identified Puballs as the man they thought to be Delahoussaye. Respondent has a Mr. Delahoussaye but Delahoussaye testified that he did not come to the Gramercy job until June 6, 1980.

[3] Puderer understood the Puballs' meeting resulted from unrest among employees which flowed from his and Spain's distribution of the safety documents. This does not square with Spain's recollection of Puballs' meeting. Spain understood that Puballs' address was "on organizing the job and . . . where it was at and how long it was going to run." I was more impressed with Spain's demeanor than that of Puderer. Puderer demonstrated some difficulty in recalling the facts as originally related in his investigatory affidavit to the Region. On occasion Puderer testified regarding facts which would have been significant, but which were not contained in his investigatory affidavit. Therefore, to the extent Spain and Puderer's testimony conflicts and to the extent that conflicting testimony does not involve matter directly involving Puderer such as his personal involvement in the alleged concerted activities on June 1, I shall credit Spain.

[4] Supervisory personnel were frequently on the ground, not up high.

[5] Respondent admitted in its answer that Perkins "has been during certain times in the past a supervisor within the meaning of Section 2(11) of the Act." The record shows, and I find, that Perkins was acting in a supervisory capacity on June 1, when he discharged Spain.

[6] Spain's account of his discharge and the preceding events were not disputed by Respondent. I was impressed by his demeanor and I credit Spain's account of those events.

[7] Puderer admitted having difficulty recalling when, on June 1, he was told of his layoff.

[8] Both Spain and Harold Puderer testified that they had their own safety belts which they were using on that day.

[9] Perkins' threat to discharge Spain was not alleged as a violation.

which were received in evidence, reflects that he was terminated because of "reduction in force."

The timing of Puderer's termination or layoff[10] creates a strong suspicion that the action flowed from his involvement in the protest. Moreover, Puderer's termination slip contains the notation "Not for Rehire." However, no evidence was offered to rebut the evidence that a reduction in force was necessitated on June 1 solely because of business considerations. Moreover, the terminated slips of other employees laid off on June 1 contained the notation "Not for Rehire." Additionally, no evidence was offered to show that Puderer was treated in a disparate manner in the selection process. The General Counsel did nothing to rebut Respondent's testimony that Puderer and the other laid-off employees were selected through a regular business-related process.

Therefore, under the doctrine of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1981),[11] I find that Respondent proved that Puderer would have been terminated on June 1 absent his protected activity.

Moreover, Puderer's account of the protest raises serious questions regarding the extent of his involvement. At various points in his testimony, Puderer expressed confusion as to whether he took off his shirt on June 1. Although Puderer's shirt was cut up, he admitted that the foreman said nothing about that. Against the background, I find the evidence is insufficient to show that Puderer's concerted activity contributed to his June 1 layoff.[12]

[10] In addition to timing, I find Puderer's June 7 layoff (see *infra* "The Remedy"), cast additional suspicion as to Respondent's motive behind the June 1 layoff. On that occasion, Puderer was told by the union steward that neither he, Spain, nor Whitfield could remain on either the night or day shift. All other employees were permitted to remain on either of the two shifts. However, no evidence was offered connecting the steward to Respondent. Therefore, I cannot consider the steward's comments probative evidence in consideration of Respondent's motivation.

[11] See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Under my understanding of the *Wright Line* doctrine, regardless of the strength of General Counsel's *prima facie* case, Respondent may by showing that the alleged discriminatee would have been terminated absent protected activities, establish a conclusive defense. Unless the evidence supporting Respondent's defense is either inconclusive, is discredited, or is effectively rebutted, I must find against the General Counsel. Here, I find no basis on which to question Respondent's evidence that Puderer was selected for layoff on June 1 along with some 12 employees because of business reasons. Nothing was offered to rebut that evidence. Although Respondent's evidence was rather general, the General Counsel, who in this case was represented by a most competent counsel, had all the normal procedures including subpena authority and cross-examination opportunities, available to develop the specifics behind the business motives. Nothing was developed on the record which demonstrated any basis on which I can question the conclusiveness of Respondent's motive evidence.

[12] The General Counsel makes the point that the June 2 referral of Spain and Puderer back to the Gramercy job demonstrates the "pretextual nature" of the June 1 reduction in force. Again, that fact raises suspicion as to Respondent's motive. However, it does not necessarily follow that a June 2 hiring of employees on the night shift shows a layoff from the day shift on the day before was unjustified. The evidence demonstrated that reductions were not unusual on the Gramercy job and no evidence was offered to show that employees were added to the day shift until June 7. Therefore, I must determine that no evidence proved the June 1 layoff was a pretext.

CONCLUSIONS OF LAW

The issues presented:[13] Did Respondent violate Section 8(a)(1) by discharging Joseph Spain on June 1, 1980, because of his protest against Respondent's employees working at a high level without safety belts?

In the first instance I shall consider whether Spain's June 1 activities were protected under the provisions of the National Labor Relations Act. I find that his actions were both concerted and protected. Spain acted in concert with other employees including Puderer and Whitfield. The object of the protest was a matter of employee safety on the job—a recognized working condition. (*Service Machine & Shipbuilding Corp.*, 253 NLRB 628 (1980); *Hintze Contracting Company, Inc.*, 236 NLRB 45 (1978); *Richbond Community Mental Health Council, Inc.*, 242 NLRB 1267 (1979); *Magna Visual*, 213 NLRB 162 (1974); *Tamara Foods, Inc.*, 258 NLRB 1307 (1981).)

Secondly, I must question the credibility of Respondent's asserted basis for the discharge of Spain; i.e., that Spain's removal and refusal to replace his shirt constituted the basis for Respondent's action. The record cast doubt on Respondent's assertion. According to Respondent's defense only Spain was discharged on June 1. At least two other employees engaged in similar conduct. Of the two others some doubt remains as to whether Harold Puderer actually removed his shirt. However, the evidence is unrebutted that Clayton Whitfield removed

[13] Two procedural questions were also presented. Respondent argues it was denied due process because the General Counsel did not present it with a proper opportunity to defend the instant charges prior to complaint issuing. The General Counsel stipulated that the factual basis in support of Respondent's arguments in this regard was correct. Respondent in its brief argued:

> In August 1980, Charging Parties, Joseph Spain and Harold Puderer filed separate charges with the 15th Region of the National Labor Relations Board alleging that their employment had been terminated in violation of Section 8(a)(1) of the Act because of their protected concerted activities of complaining about unsafe working conditions on the job. These charges were served upon Respondent along with a form cover letter. On November 26, 1980, without any further contact with the Respondent or attempt to investigate Respondent's position with respect to the charges, the Acting Regional Director for the 15th Region issued a Consolidated Complaint and Notice of Hearing. After Respondent filed its answer to complaint, the Regional Director, by letter of December 12, 1980, indicated that Respondent would be given an opportunity to present evidence in response to the charges. See General Counsels' Exhibit No. 2. After investigation of Respondent's position was conducted for the first time, the Regional Director notified Respondent on April 17, 1981, that the complaint as originally issued would stand. TR. 5-12. See General Counsel's Exhibit No. 3.

There is no doubt that the General Counsel erred in failing to fully investigate Respondent's defense prior to issuing the complaint. However, following issuance of the complaint and long before a hearing was conducted in this matter, Respondent was afforded a full opportunity to present evidence. While the General Counsel's negligence may have resulted in inconvenience to Respondent, I find that the error did not prejudice nor deny due process to Respondent. Respondent's motion is therefore denied.

Additionally, Respondent argued that Joseph Spain filed charges over his discharge with Occupational Safety and Health Administration. The dispositive portion of a letter from OSHA regarding Spain's complaint states, "The Complaint in the above-captioned matter has been administratively closed by this office." I find nothing herein which would justify my ruling that a decision herein should be deferred or withheld because of the OSHA matter. (See *Newport News Shipbuilding & Dry Dock Company*, 254 NLRB 375 (1981); *Tamara Foods, Inc.*, 258 NLRB 1307, 1310 (1981).)

his shirt at Spain's suggestion on two occasions on June 1. Whitfield may have been laid off on June 1, but on the basis of Respondent's defense which I credit regarding the Puderer allegations, Whitfield was not disciplined for removing his shirt.[14] He was laid off in a reduction-in-force because of business reasons. Therefore, Spain, the prime mover in the protest, was clearly treated in a disparate manner. Against that backgound it is apparent, and I find that the true reason behind Spain's discharge was not his refusal to put on his shirt, but was his protest against unsafe working conditions. (*Jones Dairy Farm*, 245 NLRB 1109 (1979); *Pepsi Cola Bottling Company*, 242 NLRB 265 (1979); *Northway Nursing Home*, 243 NLRB 544 (1979).)

In reaching the above determination I am also mindful that Spain's actions posed no immediate danger whereas the object of his protest, i.e., employees working without safety belts, presented a situation with the possibility of grave consequences.[15]

In view of those possible consequences it is difficult to fault the measures employed by Spain. "The general rule is that the protections of Section 7 do 'not depend on the *manner* in which the employees choose to press the dispute, but rather on the matter they are protesting,' *Plastilite Corporation*, 153 NLRB 180, 184 (1965)," *Tamara Foods, Inc., supra*. Even if I should credit Respondent's asserted basis for discharge, I would find that Spain's actions did not remove him from the ambit of the Act's protection. (*Jones Dairy Farm, supra.*)[16]

Conclusions of Law

1. Lafayette Steel Erectors, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, by discharging its employee Joseph Spain on or about June 1980, has engaged in and is engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent unlawfully discharged Joseph Spain, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make Joseph Spain whole for any loss of earnings he may have suffered as a result of the discrimination against him.[17] Backpay shall be computed as shown in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[18]

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[19]

The Respondent, Lafayette Steel Erectors, Inc., Scott, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging its employees because of its employees' concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join or assist a labor organization, or to refrain from any and all such activities, or to engage in protected concerted activities.

2. Take the following affirmative action designed and found necessary in order to effectuate the policies of the Act:

(a) Offer Joseph Spain immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges; and make Spain whole for any lost earnings he may have suffered

[14] Whitfield, unlike Spain, did not engage in discussions with the foreman regarding the protest. Moreover, the record shows that Spain initiated the protest and continued to be its spokesman and prime mover.

[15] Cf. *Irvin H. Whitehouse & Sons Co.* v. *N.L.R.B.*, 659 F.2d 830 (7th Cir. 1981), where the situation was unlike the instant matter in that the protesting employees walked off the job and the object of their protest did not "involve a hazard that suddenly arose and posed an immediate threat to worker safety." Moreover, the basic issue in the *Whitehouse* case dealt with application of grievance and no-strike provisions of the collective-bargaining agreement. In the instant situation no evidence was presented giving rise to issues regarding contract provisions.

[16] Although Spain admittedly violated one of Respondent's safety rules by removing his shirt, that fact is "insufficient to deprive employees of a statutory right." *Tamara Foods, Inc., supra*. There was no evidence that Spain's actions violated the terms of a collective-bargaining agreement.

[17] On June 2, 1980, Spain was again referred to Respondent's Gramercy job where he worked as a carpenter on the night shift until he was laid off on June 7. Respondent offered evidence that the June 7 layoff was a voluntary one and that the employees, including Spain, could have elected to remain on the night shift or transfer to the day shift. Spain admitted hearing someone say that those employees laid off from the night crew could transfer to days. However, the evidence regarding the June 7 layoff was confused by testimony from Harold Puderer. Puderer testified that he was told of the layoff by the union steward and that the steward said that Puderer and Spain were specifically excluded from exercising an option of remaining on either the night shift or the day shift. Although I credit Puderer's testimony, the evidence does not reflect whether the union steward was acting for Respondent in notifying employees of the layoff and their retention rights. Superintendent Louis Delahoussaye testified that he announced the layoff to the employees and the union steward and he did not exclude any employees from working on the day shift. The record evidence gives rise to an issue regarding Respondent's obligation under my recommendation that it reinstate and compensate Spain for lost earnings. However, the issue was not fully litigated and the evidence received herein is insufficient to resolve those questions. I recommend that the issues be handled in subsequent proceedings if necessary.

[18] See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[19] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

as a result of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its Gramercy, Louisiana, facility copies of the attached notice marked "Appendix."[20] Copies of the notice to be furnished to Respondent by the Regional Director for Region 15 and duly signed by a representative of the Respondent shall be posted by the Respondent immediately upon receipt thereof, and shall be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Decison what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not specifically found.

[20] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."